

ANTIDEGRADATION STAKEHOLDERS' SUBGROUP
MEETING SUMMARY

Date: December 11, 2008
Time: 10:00 A.M. – 4:00 P.M.
Location: IDEM's Shadeland Avenue Offices, Conference Room C

Present at the meeting:

Ann Alexander (National Resource Defense Council), Brett Barber (Greeley & Hansen), Patrick Bennett (Indiana Manufacturer's Association (IMA)), Kari Evans (Barnes & Thornburg), Lori Gates (Christopher Burke Engineering), John Humes (Hoosier Energy), Jeff Hyman (Conservation Law Center, Alliance for the Great Lakes), Barton Jones (Strand Associates, Inc.), Brad Klein (Environmental Law Policy Center), Tim Lohner* (AEP), Kay Nelson (Northwest Indiana Forum), Dan Olson (Michigan City Sanitary District), Neil Parke (Eli Lilly), Gary Powdrill (WPCB), Rae Schnapp (Hoosier Environmental Council), Dave Wagner (WPCB).

*called in via teleconference phone

Representing IDEM: Tom Easterly, Bruno Pigott, Martha Clark Mettler, Steve Roush, Dennis Clark, Shivi Selvaratnam, John Nixon, and MaryAnn Stevens.

Introductions and Review of Summary

After an introduction by each person in attendance, Martha Clark Mettler, IDEM, Office of Water Quality, Deputy Assistant Commissioner, asked if anyone had comment on the draft summary of the October 30th subgroup meeting. Kari Evans had three areas of comment to the summary. First, she requested to have the industry position she presented at the October 30th meeting summarized directly in the meeting summary and said she would write up something for IDEM to include in the meeting summary. (The draft summary referred to the documents prepared by industry, municipality, and environmental communities for their October 30th presentations and indicated the documents will be available for direct viewing on the IDEM Antidegradation Web site rather than trying to summarize each community's presentation in the subgroup meeting summary.) The other comments from Kari asked for wording changes in the summary: (1) to state the industrial position is that the unused loading capacity is equivalent to assimilative capacity, meaning the terms are the same; and (2) to remove the summary item about Albert Ettinger's question to Kari about tributaries, de minimis, and BP, which everyone, in hind sight, agreed was, apparently, a rhetorical question.

Agenda: Antidegradation Demonstration Application

The antidegradation demonstration application was the topic for discussion at the December 11th antideg subgroup meeting. In advance of the subgroup meeting, IDEM distributed copies of the Iowa and Missouri antideg policies and a list of references that Missouri used. Steve Roush and Martha Clark Mettler both commented on the similar implementation procedures used by both Iowa and Missouri. Steve pointed out the similarities do not extend to de minimis in that Iowa has no de minimis while Missouri does. Martha said she likes the readability of the two states' procedures because they are not confined by Indiana's rule writing requirements imposed by the Legislative Services Agency. Steve likes what he called a good logical process dealing with the demonstration. He commented that neither state has a magic bullet on making a finding of social or economic necessity.

General Overview Comments

Kari Evans, representing industry, wanted to talk in general terms about the two main tests that she believes are required to be satisfied in an antideg demonstration:

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- Alternative treatment technology analysis.
- Social importance within the area of the project.

Regarding technical necessity, Kari said cost is a relevant component of the analysis. Where there are federally adopted technology-based effluent limits, there should not be another review under antidegradation. In considering alternatives, non-water quality energy impacts and cost impacts need to be considered as well as environmental impacts.

Regarding important economic or social development in the project's area, Kari said:

- assessment of this importance is not IDEM's forte but other state agencies (she mentioned the Indiana Utility Regulatory Council (IURC) and the Office of the Utility Consumer Councilor (OUCC) as regards utilities and the Indiana Economic Development Council (IDEC) and the Office of Community and Rural Affairs (OCRA) as regards local planning or zoning) or local governments should conduct this assessment; and
- the antideg rule needs a built-in presumption that the other state agencies and local governments carry weight in this assessment.

Kari referred to the Colorado guidance document saying it has more operational history than most state guidance and it gives substantial weight to local government decision making.

Bruno Pigott asked for clarification from Kari as to whether she is saying there is a role for other state and local agencies in the economic or social importance decision about a project under antideg review or is she saying there should be antideg rule requirement for it.

Kari responded that, yes, the "substantial weight" language is in guidance and she wants a basic statement to that same affect in the antideg rule.

Martha Clark Mettler added that the antideg rule already contains a statement giving consideration to the other state and local agencies' decisions, but the "substantial weight" term is not presently in the rule language.

Kari remarked that the determination needs to be backed by documentation.

Jeff Hyman, representing the environmental community, stated that:

- the question is not if a project is important for some other reason; but rather
- the question is whether the project is important enough to warrant allowing water quality to be impacted.

Jeff said there is a need to balance economic benefits against the costs of impacting water quality. He said the IURC decision making process is based on very different criteria than IDEM's water quality-based decision making. Jeff stated that, even if IURC thinks a project has economic importance, IURC doesn't consider if the economic importance is balanced against the cost of water quality degradation.

For clarification, Bruno restated what he heard from Jeff, which is that collecting other agencies' information is a good start but not enough since other agencies don't have water quality criteria as their guiding principal.

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John Humes, Hoosier Energy, stated his belief that the economic and social importance consideration is a pass-fail test and not a balancing act. He said a project gets to go forward if it passes the social or economic importance consideration and there is no call for social or economic importance to be balanced against anything.

Brad Klein, representing the environmental community, said the key is on “importance”. What has to be considered is the importance of going forward with a project weighed against the importance of protecting against impairment to water quality. If the importance of protecting water quality against impairment from a project outweighs the social or economic importance of going forward, then the social or economic importance fails compared to the importance of protecting water quality.

Martha agreed that different levels of attention are given by various other agencies.

Kari agreed local zoning boards don’t consider water quality, but she said consideration of technical necessity is a separate test. She repeated that EPA made the two tests separate.

Jeff referred back to federal policy that requires a showing that lowering of water quality is socially or economically important and whether the water quality lowering is necessary to accommodate the project. That decision, Jeff says, includes balancing.

Bruno tried to summarize the discussion thus far by saying he thinks there is not a disagreement among the opinions stated. His understanding is that:

- the two tests that Kari discussed are parts of the whole process of balancing; and
- Kari is saying that if other agencies say a project has social or economic importance then IDEM must give weight to the other agency’s decision.

Jeff expanded on Bruno’s thoughts by saying the importance test in IDEM’s draft antidegradation demonstration application is incomplete because it only considers social and economic importance of a project. Jeff said the application also needs to consider the negative impacts of degrading the water quality. Negative social and economic impacts depend on specifics of water quality impacts. The piece missing from the application is negative impacts. Different agencies place different weight on impacts.

Commissioner Easterly stated that there are only negative impacts to assimilative capacity.

Tim Lohner, representing AEP, stated that an environmental impact statement considers the negative impacts that Jeff is talking about. Tim thinks an IURC decision doesn’t exclude environmental impacts.

Jeff didn’t disagree with Tim but said there should not be a flat presumption that another agency’s decision carries weight.

John Nixon, IDEM’s legal counsel, stated that IDEM has no trained economists, and, without such, “substantial” (reference to Kari’s request for “substantial weight” to be included in antidegradation rule language) may be the wrong modifier.

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Jeff dislikes the entire concept of “presumption” (reference to Kari’s assertion that the antideg rule should have a built-in presumption that the other state agencies and local governments carry weight in the social or economic assessment).

Kari countered that IDEM shouldn’t have to come up with an economic analysis when other agencies have opinions. She referred to EPA’s EIG program, which she says has trained economists. She also stated that IURC has trained economists.

Brad Klein stated that public participation needs to be considered when assessing the social and economic importance of a project. He asked how IDEM would qualify going from a lot of assimilative capacity to having only a little left in the waterbody. He said future use is curtailed if a lot of assimilative capacity is given away to a single project. As an example, he talked about a pristine stream having recreational use and tourism value bringing local income and it suffering loss in value when the water quality is brought down to the level of just meeting the standard.

Ann Alexander agreed and said importance is not to be considered in a vacuum but in context of a larger set of issues.

Dave Wagner, representing the Water Pollution Control Board, said he doesn’t see so much disagreement among the opinions stated. He thought the addition of a list of possible examples on page 5 of the draft application could explain what possible additional information IDEM may request from the applicant. He agreed with John Nixon that “substantial” is not an appropriate word for use in rule language.

John Nixon made a general, summarizing statement that:

- IDEM would agree to consider other decisions and negative impacts; and
- “substantial” is not a usable word in rule language.

Jeff asked about the area that is to be considered in a project’s economic and social analysis of importance. He said that for antidegradation the area of analysis is supposed to be the area of the affected water not just the area of the project.

Rae Schnapp, representing the environmental community, commented that an economic analysis may have findings good for the state that are not always good for the local residents near the project who are affected by lessened water quality or lost recreational usage.

Specific Comments on IDEM’s Draft Antideg Demonstration Application

It was difficult to separate specific comments on the draft application entirely from general comments, but the following summary is focused on the specific discussion comments.

Jeff Hyman led off with the initial, specific question on the draft application by asking why the application is so different from the rule. He thinks the application should be self-explanatory or it should explain that the application needs to be used in concert with the rule.

Martha Clark Mettler stated that IDEM finds it to be a tricky balance on how much detail from the rule to include in the application. She said the purpose of the application is to produce the technical information that is needed for making a decision, but IDEM also needs to learn the purpose of the discharge--why the applicant believes the project is needed.

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Brad Klein suggested the application needs to note that the applicant should begin talking with IDEM early in order to coordinate a complete application. Where the draft application asks for specific information, Brad suggested additional language clarifying IDEM's ability to request more information when needed. (It was previously pointed out that the draft application contains language under "Describe the important social and economic development associated with the project:" that says IDEM may request more information.)

Alternatives Analysis

Jeff referred to the EPA Region 8 list of alternatives to be considered and said a similar list should be included in IDEM's application so the applicant knows the range of alternative options that needs to be considered.

Commissioner Easterly remarked that he doesn't want completing the application to be a million dollar project.

Jeff countered that he is not saying the applicant has to do research on every alternative, but having a list of possible alternatives in the application can help make the applicant aware of possibilities.

Dave Wagner agreed that a list of possible alternatives included in the application would help.

Brad referred IDEM to Region 8, Ohio, and Illinois as good examples of applications. He also said the forgotten alternative is the no discharge option or choosing another discharge location.

Lori Gates, considering the draft application, said it is not an application but a nightmare for IDEM staff who would be receiving information from applicants in many different formats.

Wastewater Characterization

Kari Evans pointed out the usage of terms "priority pollutant" vs. "pollutant of concern" and she asked if Appendix A is the same as Form 2C. She said the terms should be used consistently throughout the application and should match usage elsewhere.

Steve Roush said the antideg demonstration process should occur before the permit application is submitted.

Kari stated that most states conduct the antideg demonstration review simultaneously with the permit application review.

Brad contributed that Iowa does the antideg review before the permit application review.

Martha asked that the subgroup save the timing discussion for the permit discussion.

Commissioner Easterly asked where on the antideg application would the applicant report on other alternative discharge locations.

Martha referred the commissioner to the Alternatives Analysis part of the application.

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John Nixon pointed out that Part 5 under General Information on page 1 of the application asks for a description and location of receiving water(s) that will be affected by the new or increased discharge.

In response to Brad's mention of Iowa doing antideg before permit application review, Steve said Iowa takes two years to review the antideg demonstration before getting to the permitting stage.

Brad explained that Iowa wants a facility to have a better idea of its viable options based on the antidegradation review so the facility will know during the facility planning analysis and solicit public comment then attach that information to the NPDES application so the facility doesn't get to the NPDES stage without having gotten public input that reveals another option.

Kari said the timing should be optional because some projects won't happen if that much lead in time is necessary.

Brad said timing varies but the point is that antideg consideration needs to happen when facility planning is ongoing.

Steve said IDEM has to have the information in order to identify all the potential pollutants of concern (POC), but if the information arrives with the permit application then the 180 day schedule is triggered for IDEM.

Dave Wagner repeated a comment made by Brad that the message needs to be gotten to applicants that they need to interact early with IDEM. After doing that, Dave says the responsibility rests with the applicant to provide a complete application.

Kay Nelson, representing the Northwest Indiana Forum, said that economic development organizations are adding information to their Web sites about communicating with IDEM.

General Information

In an attempt to get the discussion back to the specific elements of the draft antideg application, Martha suggested starting on page one with the requested general information. She said the intent of the application was that the applicant would focus on the alternative that the applicant wants to choose. A check list was mentioned as possibility so an applicant would be able to identify all the elements needed for a complete application.

Dan Olson, representing the municipalities, said there are only a few situations under which a municipality would need to do an antideg demonstration (such as accepting a new industrial discharger) so he cannot see the need for a municipality to go through the entire application as laid out by the draft application. He said he is in favor of having a demonstration process, but it has to make sense for the applicant. He mentioned the municipal situation of having a growing population that necessitates more wastewater treatment and said a streamlined antideg demonstration application should be available for that situation.

Steve said IDEM has recognized that municipal situation and could develop a separate application for municipalities. The draft application under consideration by the subgroup at today's meeting is more in line with industrial applicants.

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Brad asked about new pollutants not contained in the list of POCs.

Martha said an applicant should, at least, look for the POCs on the list but also include other pollutants known to exist in the discharge.

Steve said the industrial form does have an opportunity to include other pollutants beyond those on the list.

Dave Wagner pointed out that chlorides are not on the list (Appendix A) and that pH is misrepresented as "Ph".

Alternative Analysis

Practicability of Alternatives

This discussion started with a musing quip about the terms "practicable" and "practical" and wondering if they are distinct terms. A couple days later, Jeff provided the following dictionary distinction: "'Practical' stresses effectiveness as tested by actual experience or as measured by a completely realistic approach to the particular circumstances involved. 'Practicable' is used for something that appears to be capable of being put into effect, but has not yet been developed or tried."

Kari asked that a provision be added to the Practicability evaluation for the applicant and IDEM to consider improved safety, such as safety improvements for workers or the community.

Dan Olson asked about an alternative under consideration that is known to be new or experimental. He said he doesn't want his treatment facility to be the first to try a type of treatment. As an example, he referenced a treatment technology developed in Israel that produced no sludge, but he wonders if the climate differences between Israel and Northwest Indiana are too great to risk trying the treatment technology in Indiana. Dan was more inclined toward Iowa's language for new or experimental processes.

John Humes asked if an air emission treatment technology that has never been built is actually an alternative needing consideration. He wants consideration to be given to energy consumption.

Jeff asked whether an applicant is required to evaluate if a treatment technology will impact endangered species. He said an alternative that avoids impact to an endangered species should be chosen.

Martha responded that the applicant must contact the Indiana Department of Natural Resources to investigate if there are endangered species in the area of the project.

Brad remarked that the discussion was missing the actual standard that guides IDEM's decision in practicability evaluation. Brad said the technical feasibility is to be considered for all alternatives on the applicant's list of alternatives and then the applicant is to consider which are nondegrading alternatives. He thought most applicants can provide documentation on what is technically most feasible, but they also need to identify what level of impact is caused by noise, odor, air emissions, etc.

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Ann Alexander described the practicability evaluation as a “whittle down process”, where Step 1 is compiling a complete list of alternatives; Step 2 is eliminating technically infeasible alternatives; and Step 3 is ranking the remaining alternatives with consideration of cumulative impacts.

Dan stated that no community will put in a technically feasible treatment alternative that has exorbitant costs or treatment that will create a situation making neighboring residents miserable. He said the factors required to be considered under practicability need to be contained in the application.

Bruno summarized the discussion thus far by stating he understands the application needs to be clear on the availability of a top down approach to choosing an alternative. In that regard, Bruno pointed out the statement on the top of page 3 of the draft application: “An applicant can bypass the cost comparison step by choosing to implement the least degrading alternative for each pollutant of concern.”

Lori Gates suggested a visual representation of the application process, including a flow chart, would be helpful for applicants. (In later discussion, the idea of a flow chart brought forth groans in remembrance of the initial antideg workgroup meeting in April 2008, which included so much debate on flow charts.)

Economic Efficiency

Jeff asked about the role of the applicant in determining the trade off of pollutants that could be discharged by a treatment alternative. He asked about the last sentence on page 2 of the draft application (“An applicant may need to evaluate the costs associated with one pollutant of concern if additional treatment process alternatives do not effect treatment of other pollutants of concern.”)

Kari asked about the intention behind the second paragraph on page 3 of the draft application (“This quantitative water quality analysis is not needed when the receiving water quality is not a significant factor for a specific alternative (e.g., in-stream dissolved oxygen concentrations in relation to a no-discharge alternative).”) Brad thought this language might be a hold over from Missouri’s de minimis consideration where the application asks for existing water quality. Most in the subgroup thought this language might not be necessary in Indiana’s application.

Jeff questioned if the second sentence on page 3 of the draft application was intended to just flippantly turn over to the applicant the decision that is supposed to be made by IDEM. (“Alternatives that impose a cost that is disproportionate to the possible environmental gain may be eliminated as impracticable.”)

Martha thought that sentence was intended to be an introduction to further explanation by the applicant, and she said IDEM would add a note that if an alternative is eliminated for the reason specified by this language then the applicant must explain why it was eliminated.

Jeff voiced dissatisfaction with the Economic Efficiency evaluation portion of the draft application. He questioned if cost benefit analysis of an alternative can be done if the economic efficiency evaluation is above 115% of the base cost of pollution control and was told “yes”.

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Martha said the process starts with a reasonable alternative for which a cost comparison is done against other alternatives.

Brad added that the key is whether there is proportional gain to the costs.

Jeff favors a cost to benefit evaluation rather than a cost to effectiveness evaluation. He asked for examples of calculating cost effectiveness. Jeff stated that it is very difficult to balance cost and efficiency, which is why he believes public input is very important.

Affordability

Dave Wagner thinks the final sentence currently in italics under "Affordability" needs to be in bold font to emphasize that, if an alternative is not assessed for affordability by the applicant, then it is assumed to be affordable.

Brad stated that the draft application language on Affordability is very vague and without standards. He questioned how the draft application language comported with the federal standards. He finds the affordability language devoid of connection to water quality benefits.

Martha thought the subgroup's discussion jumped directly to industrial affordability analysis. The situation fitting the draft application's affordability language is probably a community presently without wastewater treatment and without the ability to afford much expense though there is need to provide wastewater treatment.

Ann Alexander said the affordability test should compare with the stringency of the UAA evaluation.

Jeff commented that IDEM has published no information on how it will consider affordability information submitted in an application. He said there needs to be a structure for determining how to balance the determining factors. He is concerned that claims by industry that information in an affordability analysis is proprietary will mean an applicant can say anything is unaffordable and there will be no means to challenge the claim.

Commissioner Easterly commented that affordability cannot be denied by the applicant by claiming confidentiality and refusing to divulge the information used to base the determination of unaffordability.

John Humes took issue with the idea that information related to cost, which he stated is confidential, should be divulged for any reason. He stated that the cost of coal is a trade secret for his utility because it affects the affordability of selling electricity to the national grid.

Ann expressed her discomfort that affordability is being treated incrementally rather than absolutely. She believes that unaffordability, defined correctly, means the treatment alternative is greatly unworkable.

Evaluation of Social and Economic Importance

Identify the affected community

Commissioner Easterly questioned the possible extensiveness of the area in which the waters are located.

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Brad conceded the area of the water affected by a project is not a bright geographical line but should be extended to areas where the benefits and impacts of the project may extend.

Kari agreed that the area of antidegradation consideration is fuzzy and not a bright line, unlike the certainty of waters impacted by CSO wet weather. She asked that the "community in which the waters are located" not be defined purely on the basis of economic benefit, while excluding environmental impacts, because the costs to water quality are very local but economic benefits could be global in today's global economy.

Dave Wagner stated that, whatever is decided to be the "community in which the waters are located", those residents in that area should receive notice of IDEM's receipt of an antidegradation application.

Relevant factors that characterize the social and economic conditions of the affected community
The list of social and economic factors on page 4 of the draft application is not a comprehensive list according to Brad. Possible additions to the list of factors to be considered include: water quality lowering; impact to tourism, including the economic value of fishing (licenses) and wildlife (scenic opportunities, hunting licenses); aquatic structure; and human health.

Brad reminded the subgroup that the applicant must demonstrate that the project is important and it is IDEM's role to determine if the demonstration has balanced social and economic factors.

Jeff stated that an economic analysis will always be biased because it is easy to find economic benefit in the generation of more jobs, but it is not easy to quantify social benefits such as the economic value of tourism.

Brett Barber suggested that a pristine stream losing recreational and tourism value will be caught by public comment.

Ann isn't satisfied with relying on public comment alone but also wants the rule to contain a requirement to evaluate such considerations as recreation and tourism.

John Nixon referred the subgroup to the rule language in the latest draft at section 6(b)(9), which reads as follows:

(9) The effects of lower water quality on the economic value of the receiving water or waters considering the following:

(A) Recreation, tourism, and other commercial activities.

(B) Aesthetics.

(C) Other use and enjoyment by humans.

John explained that section 6(b)(9) dovetails with 6(b)(15), where the language of the application's social and economic factors list is found in rule.

Brad related knowledge of a couple of states having difficulty in quantifying social impact.

Kay Nelson said her economic development organization has had little success in identifying the economic value of lost revenues from tourism, park fees, and the like.

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Martha repeated what she previously has said is the very important purpose of the application, which is an opportunity for the applicant to tell its story, what affects the community around the project, and activities impacting the waterbody. It doesn't serve the applicant well to tell an incomplete story.

John Humes stated it is impossible to assess the value of reserving assimilative capacity in the receiving stream for future industrial use.

Final Discussion Point--DTBELs

Dan Olson asked that IDEM's antidegradation demonstration application contain examples of DTBELs. Kari asked for industrial examples of DTBELs.

Martha stated that it is still unknown if the concept of DTBEL will be kept in the rule.

Dan said he isn't saying he is opposed to the use of DTBELs, but he wants to know how they will apply. He asked, if DTBEL is the chosen limit, would an antideg demonstration be required?

Commissioner Easterly said that a year ago, in IDEM's concept of applying antidegradation, a facility choosing to accept a DTBEL would be finished with the antideg demonstration process as long as the DTBEL represented the absolute best available technology. However, that would not be applicable to choosing an alternative of no degradation or making a change of discharge location to lessen water quality impacts.

WRAP UP

The remaining topics for discussion by the subgroup are public notification and the OSRW fee or project.

Jeff stated his problem with IDEM's antideg process is that it includes no public input.

Brad asked that IDEM circulate Iowa's language for conducting an antidegradation demonstration review at the same time as facility planning. He referred to a PSD analysis which is only good for 18 months, and he asked if an antideg analysis done in Indiana would be valid even if done far in advance.

Dan wanted to know how a project or fee requirement will be applied to an upstream tributary to an OSRW.

NEXT STEPS

The next subgroup meeting is scheduled for Tuesday, January 6, 2009, from 10 am to 4 pm, at IDEM's Shadeland Avenue office, Conference Room C. The meeting topic is public notification requirements under antidegradation.

Summary of Subgroup Consensus from this Meeting

It was agreed that a list of possible alternatives that could be considered by an applicant should be included in the application with acknowledgement that the list is not to be considered exhaustive and the applicant does not have to research each alternative if it is not applicable to the applicant's situation.